IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE SIDE, JURISDICTION

CRIMINAL APPEAL NO.147 OF 1988

The State of Maharashtra	)	APPELLANT (Orig.complainant)
Versus		
Hasham Chand Pathan, Age:48 years, Occ.Driver, Residing at Survey No.75, Bhekarrai Nagar, Hadapsar, Pune.	)))))	RESPONDENT (Orig.Accused)

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Mrs. A.S.Pai, APP for the State.

Mr.Prakash Naik, Advocate for the Respondent.

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CORAM : D.G.DESHPANDE & SMT.V.K.TAHILRAMANI, JJ.

DATED : MARCH 07, 2006.

ORAL JUDGMENT (PER TAHILRAMANI,J.)

. Through this Appeal, the appellant i.e. the State of Maharashtra has challenged the judgment and order dated 12th November, 1987 passed by the learned Additional Sessions Judge, Pune in Sessions Case No.266 of 1987. By the said judgment and order, the learned Additional Sessions Judge acquitted the respondent i.e. original accused of the offences under Sections 302 and 498-A of IPC.

2. The prosecution case, briefly stated, is as under :

. The deceased Raziya was the second wife of the respondent-Hasham Chand Pathan. About 10 years prior to his marriage with Raziya, respondent had performed his first marriage with Madinabi. Madinabi could not bear any child, hence, the respondent married Raziya. The respondent was maintaining both his wives. He kept both the wives in separate accommodation. Raziya had grudge that most of the time respondent was living with his first wife and only once in a week he came to stay with her. On account of this, there were quarrels between the respondent and Raziya. On the night between 2nd December, 1986 and 3rd December, 1986 at about 2:00 a.m., the respondent poured kerosene on the body of Raziya and set her on fire. She was taken to hospital. According to the prosecution Raziya give dying declaration (Exh.9) wherein she stated that the accused poured kerosene on her and set her on fire. On account of 100% burns, Raziya died on 3rd December, 1986 in the morning at 7:00 a.m.. After the completion of investigation, the charge sheet came to be filed. In due course, the case was committed to the Court of Session.

3. The charge came to be framed against the respondent under Sections 498-A and 302 of IPC. The

respondent pleaded not guilty to the said charge and claimed to be tried. His defence is that he married Raziya with an expectation that she will bear him a child. He kept Raziya separately. He maintained Raziya properly. Raziya was taking objection to the respondent visiting his first wife. On the night of incident at 2:00 a.m., he was shocked to hear Raziya's shouts. She was ingulfed in flames. He struggled to put off the fire. He took Raziya to Sasoon Hospital and admitted her there. He sustained 21% burn injuries while extinguishing the fire. He was also admitted in hospital for treatment and he was there in hospital for many days. After going through the evidence adduced by the prosecution, the learned Additional Sessions Judge acquitted the respondent, as stated in Para 1 above. Hence this Appeal.

4. We have heard Mrs.Pai learned A.P.P for the appellant-State and Mr.Prakash Naik learned Advocate for the respondent-original accused. We have also perused the evidence on record as well as the judgment and order of the learned Additional Sessions Judge.

5. As far as the charge under Section 498-A of IPC is concerned, the prosecution has examined P.W.3 Husein Inamdar, who is the father of Raziya. He has stated that the first wife of the respondent-accused was

alive, but, she was issueless. So the accused performed his second marriage with Raziya i.e. the daughter of this witness. This witness does not state about any ill-treatment or cruelty being meted-out to Raziya. Infact, P.W.3 Husein has stated that 2-4 days prior to the date of incident, he met Raziya at Bhavani Peth. However, he does not state that on that occasion or prior to that Raziya had told him that her husband was harassing or ill-treating her. No other witness has deposed about Raziya being treated with cruelty by the respondent. In such case, in our view, the learned Judge has rightly acquitted the respondent of the offence under Section 498-A of IPC.

6. As far as the charge under Section 302 of IPC is concerned, the prosecution has relied on the dying declaration (Exh.9) of Raziya recorded by P.W.4 Special Judicial Magistrate Dahiwal and oral dying declaration given by Raziya to P.W.3 i.e. her father. P.W.4 S.J.M. Dahiwal had recorded the dying declaration of Raziya as well as the respondent. The dying declaration (Exh.11) of the respondent was recorded as he had sustained 21% burns and he was also admitted to the hospital. As far as the dying declaration of Raziya is concerned we are of the opinion that it cannot be safely relied upon because it has come on record that brother of Raziya who is Police Head

Constable as well as her father i.e. P.W.3 Husein Inamdar were present in the hospital when Raziya was admitted. Dr.Wani-P.W.2 has admitted this fact. This shows that the father and brother of Raziya were present in the hospital even before the S.J.M. arrived at the hospital. Moreover it has come on record that they had an opportunity to talk with her. P.W.3 Inamdar, the father of Raziya has stated that he had talk with Raziya in the hospital, thereafter as he felt giddy he went home. In the morning he was informed that Raziya had died. This witness has further stated that till he left the hospital, the S.J.M. had not come. In view of these circumstances which have come on record, the learned Sessions Judge felt that it was not safe to rely on the dying declaration recorded by P.W.4 S.J.M. Dahiwal.

7. In this case, an unusual feature is that two dying declarations came to be recorded i.e. one of deceased Raziya and second of respondent-accused. In his statement (Exh.11) the respondent also gave the history of the incident. He stated that there was quarrel between them in the night. Thereafter they both slept in the same room. He got up at about 2:00 a.m. on hearing noise and he was surprised to see that Raziya was burning herself and so he extinguished the fire and during this process he received burn injuries.

In short what we observed is that it is a case of oath versus oath and hence the question arises as to whether the statement of Raziya is to be accepted or the explanation given by the accused is to be rejected. The statement of the accused which was made in the form of dying declaration cannot be looked into as a dying declaration. However as the prosecution has brought the said statement on record, the accused is relying on the same by way of his defence. This statement can be looked into not as a dying declaration but as the defence of the accused.

8. In the present case, the evidence of the wife cannot be said to be free from bias or hatred. She is the second wife and still she found that the accused was having much more attachment to the first wife. In these circumstances she is bound to feel angry and have a deep feeling of resentment on account of this. Thus it appears that with intent to wreck her vengeance on the accused, she has attempted to involve the accused. The evidence also further shows that before her statement was recorded, her father and brother who is a police constable met her. In such case, her narration cannot be said to be free from any influence. Taking into consideration all these facts, we also hesitate to accept the dying declaration of Raziya.

9. As far as the accused is concerned, if the accused wanted to get rid of Raziya, he being a Muslim, it was possible for him to divorce Raziya easily. He could have also totally avoided visiting Raziya. He would not put his life in danger by suffering burns to the extent of 21% in order to extinguish the fire in which Raziya was ingulfed.

10. The learned Sessions Judge has given above reasons as well as some other plausible reasons for the acquittal in the impugned judgment. We do not want to overburden this judgment by repeating them here. It is well settled that if the order of acquittal could have been reasonably arrived at then the mere circumstance that the appellate court could have taken a different view would be no ground to interfere. In this connection, there are no dearth of authorities, but, to eschew prolixity we are only referring to two of them i.e. **AIR 1971 SC 66 Khedu Mohton and Ors. Vs. State of Bihar and 1997 (1) Mh.L.J.770 State of Maharashtra Vs. Balram @ Nam Amarsingh Talwar.** It has been observed in para 12 of the decision in 1997 (1) Mh.L.J.770 that:-

> "12. At the very outset, we would like to point out that we are seized of the matter in an appeal against acquittal. It is well settled

that unless appreciation of evidence is clearly unreasonable or the impugned order of acquittal is vitiated by some illegality, this court does not interfere in an appeal against acquittal. It is equally well settled that if the view of acquittal is a possible view then this Court does not interfere in spite of the fact that it may feel that had it been the trial Court, it may have taken a different view. We are fortified in our view by the decisions of the Apex Court reported in **AIR 1971 SC 66 Khedu Mohton and Ors. Vs. State of Bihar and AIR 1987 SC 1083 Tota Singh Vs State of Punjab.** We also feel that in this connection, it would be pertinent to refer to the decision of the Apex Court reported in **1995(2) SCC 486, State of Punjab Vs. Ajaib Singh,** where in para 7, Their Lordships of the Apex Court observed thus:-

> " We agree that this Court is not precluded or the court hearing the appeal against acquittal is not prevented from examining and reappreciating the evidence on record. But the duty of a court hearing the appeal against acquittal in the first instance is to satisfy itself if the view taken by acquitting court exercising appellate jurisdiction was possible view or not. And if the court comes to conclusion that it was not, it can on reappreciation of evidence reverse the order."

11. In our view, the view of acquittal was a reasonable and possible view. There is no illegality or impropriety in the judgment passed by the learned Sessions Judge. In the circumstance, we find no merit in this matter and the same is dismissed. If the accused has pursuant to action under Section 390 of Cr.P.C., furnished surety or bond, the same shall stand cancelled.

(D.G.DESHPANDE,J.)

(SMT.V.K.TAHILRAMANI,J.)